Aboriginal Young People in the Children's Court of Western Australia: Findings From the National Assessment of Australian Children's Courts

CAROLINE SPIRANOVIC, JOSEPH CLARE, LORANA BARTELS, MICHAEL CLARE AND BRENDA CLARE*

This article presents the findings of recent research involving stakeholders in the Children's Court of Western Australia (CCWA). This research found that the needs of Aboriginal children and their families are not being properly addressed due to resource deficiencies, especially in rural and remote areas. There was a clear awareness that the CCWA is responding to behavioural symptoms of disenfranchisement and poverty amongst Aboriginal people, and that solving these deeply embedded social problems was beyond the scope of the CCWA. The urgent need to address systemic issues in an inclusive and empowering way was also identified.

I INTRODUCTION

This article presents some of the findings of interviews with judicial officers and other relevant stakeholders about the operation of the Children's Court of Western Australia ('the CCWA' or 'the Court'). The interviews were conducted as part of a national assessment of Australian Children's Courts ('the national study').[1] The present article builds on earlier analyses of the Western Australian (WA) component of the study[2] by focusing on the treatment of and responses to

* Dr Caroline Spiranovic, University of Tasmania; Dr Joseph Clare, University of Western Australia; A/Prof Lorana Bartels, University of Canberra; Prof Michael Clare, University of Western Australia; Dr Brenda Clare, University of Western Australia.

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1 See Allan Borowski, 'Whither Australia's Children's Courts? Findings of the National Assessment of Australia's Children's Courts' (2013) 46 *Australian and New Zealand Journal of Criminology* 268 (Borowski (2013a)); Allan Borowski, 'A Portrait of Australia's Children's Courts: Findings of a National Assessment' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 165 (Borowski (2013b)).

2 See Mike Clare, Joseph Clare, Caroline Spiranovic and Brenda Clare, *An Assessment of the Children's Court of Western Australia: Part of a National Assessment of Australia's Children's Courts* (University of Western Australia, 2011); Caroline Spiranovic, Joseph

Aboriginal[3] young people in the Court.

This article is presented in four parts. The balance of this section presents an overview of (a) the CCWA jurisdiction, (b) the legislation governing the CCWA, and (c) some of the issues relevant to Aboriginal young people in the justice system in WA. Part II provides an overview of the relevant empirical research, including studies involving interviews with youth justice judicial officers, evaluations of Indigenous youth courts, and the findings on Indigenous issues from the other jurisdictions in the national study. Part III presents the WA study method and an in-depth examination of the findings that relate to Aboriginal young people. The key findings from the WA component of the national study were:

- Aboriginal children, young people, families and communities are over-represented in both the welfare and the criminal jurisdictions of the CCWA;
- there is a lack of appropriate services and programs for children and families across both jurisdictions;
- the lack of an integrated approach to practices within the Department of Child Protection, Youth Justice and the WA Police impacts adversely on case outcomes;
- the challenges faced by all stakeholder agencies and the current proceduralised practice and decision-making processes are eroding the impact of service outcomes; and
- agency-specific professional development opportunities and opportunities for inter- agency training and development should be established.

The article then concludes by considering future directions for the CCWA.

A Overview of the CCWA's Jurisdiction and Key Legislation

The *Children's Court Act 1988* (WA) covers the administration of the CCWA in relation to such issues as the Court's jurisdiction and procedure, as well as the establishment of the Court and appointment of judges and magistrates. There are two types of judicial officers in the Court, specialists and non-specialists.

Clare, Mike Clare, and Brenda Clare, 'Youth Justice and Child Protection: The Children's Court in Western Australia' in Rosemary Sheehan and Allan Borowski (eds) *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 143.

3 In this article, the term 'Aboriginal' is generally used in relation to WA, as this is the term most commonly used in the literature, and the term 'Indigenous' is used in relation to other jurisdictions or Australia generally. However, both terms should be taken, where appropriate, to include Torres Strait Islanders.

Specialist judicial officers are based in Perth but travel throughout the state, and comprise the President of the Court, four full-time magistrates and one part-time magistrate. These judicial officers have jurisdiction for offences alleged to have been committed by young people aged 10-17. They also hear all protection and care matters pertaining to young people aged under 18. The President is a judge of the WA District Court and has the same sentencing powers as a Supreme Court judge. The maximum sentence a magistrate can impose for a community order or detention is 12 months, so the President deals with all matters that require a longer sentence and hears reviews against the decisions of CCWA magistrates.

Outside the Perth metropolitan region, there are 13 country court magistrates who preside over Children's Court matters. These magistrates are non-specialists, in the sense that they are charged with a broader jurisdiction that includes Children's Court matters, as well as criminal and civil matters involving adults in the Magistrates' Court. In this context, the size of WA is a significant consideration – some magistrates preside over regions that are larger geographically than the entire state of Victoria. As discussed further below, this has considerable logistical implications for the CCWA and the administration of justice in WA more broadly.

In addition to the *Sentencing Act 1995* (WA), which applies to all offenders sentenced in WA, the two key pieces of legislation governing matters in the CCWA are the *Young Offenders Act 1994* (WA) and the *Children and Community Services Act 2004* (WA).

Under section 7 of the *Young Offenders Act 1994* (WA), a number of general principles apply, including:

- the need for special provision to ensure young persons before the courts are treated fairly, are dealt with in a way that encourages them to take responsibility for their actions and develop social responsibility, and are not treated more severely than adults;
- the need to protect the community;
- the principle of detention as a last resort;
- consideration of the offender's age, maturity, and cultural background; and
- the need to deal with each young offender in a way that strengthens their family group, fosters their family's ability to develop its own means of dealing with the young offender, and recognises the young person's right to belong to a family.[4]

The *Young Offenders Act 1994* (WA) emphasises the use of pre-court diversionary methods in managing the majority of young offenders who have committed less

4 It has been suggested that this last principle 'has particular relevance in regards to youth justice in relation to Aboriginal young people': Harry Blagg, *Youth Justice in Western* Australia (Report prepared for the Commissioner for Children and Young People WA, 2009) 13.

serious offences. Two primary methods for pre-court diversion are utilised in WA:

- formal and informal police cautioning, whereby police have the discretion to issue verbal or written cautions to juveniles committing minor offences; and
- formal diversion to pre-court juvenile justice teams (JJTs), which can include a juvenile justice officer, police officer, member of the Department of Education and/or an Aboriginal community representative.[5]

Both the police and the courts are able to refer young offenders to JJTs, which are underpinned by restorative justice principles.[6] The JJTs engage in pre-court conferencing with the offender and the offender's family, as well as the victim(s) if they are willing to participate. Where a young person has complied with the terms determined by the JJT, any court hearing a charge in relation to the offence must dismiss without determining it.[7]

The *Children and Community Services Act 2004* (WA) is the key piece of legislation guiding the welfare jurisdiction. Section 7 makes it clear that the best interests of the child are paramount under the Act.[8] A number of other principles are set out in section 9, including that

- a child's parents, family and community have a primary role in safeguarding and promoting the child's wellbeing;
- the preferred way of safeguarding and promoting a child's wellbeing is by supporting the child's parents, family and community; and
- that every child should live in an environment free from violence.

In addition, the Act outlines three principles of specific relevance to Aboriginal and Torres Strait Islander (ATSI) children, namely:

- the ATSI child placement principle, which prioritises placing ATSI children with ATSI carers;[9]
- the principle of self-determination;[10] and
- the principle of community participation.[11]

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5 *Young Offenders Act 1994* (WA) s 37.

6 For discussion, see Blagg, above n 4, 6-8; Don Weatherburn, Andrew McGrath and Lorana Bartels, 'Three Dogmas of Juvenile Justice' (2012) 35 *University of NSW Law Journal* 781, 786-787.

7 *Young Offenders Act 1994* (WA) s 33(2).

8 *Children and Community Services Act 2004* (WA) s 7.

9 Ibid s 12. For a recent critique of this principle, see Jeremy Sammut, 'We Risk A Lost Generation', *The Australian*, 8 December 2014, 12.

10 *Children and Community Services Act 2004* (WA) s 13.

11 Ibid s 14.

B Aboriginal Young People and the WA Justice System

In 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs completed an extensive report entitled *Doing Time – Time For Doing: Indigenous Youth in the Criminal Justice System* ('*Doing Time*'), where it described the issue of Indigenous young people in the criminal justice system as a 'national crisis' and noted:

> We have reached the point of intergenerational family dysfunction in many Indigenous communities, with problems of domestic violence, alcohol and drug abuse, inadequate housing, poor health and school attendance, and a lack of job skills and employment opportunities impacting on the next generation of Indigenous Australians. Additionally, there has been a loss of cultural knowledge in many Indigenous communities, which has disrupted traditional values and norms of appropriate social behaviour from being transferred from one generation to the next.[12]

Data from the Australian Institute of Health and Welfare (AIHW) indicated that although only 5 percent of all 10–17 years olds in Australia are Indigenous, on an average day in 2012-13, 40 percent of young people under youth justice supervision were Indigenous. Furthermore, this proportion rose to 50 percent for young people in detention.[13]

Damning as these national figures are in their own right, this situation regarding Aboriginal young people in WA is 'particularly worrying'.[14] While the AIHW does not report on WA specifically, weekly offender statistics produced by the WA Department of Corrective Services indicate that, as at 26 June 2014, Aboriginal young people accounted for 67 percent of all young people in WA on community-based orders and 77 percent of the juvenile custodial population.[15]

In 2012-13, Aboriginal young people accounted for 48 percent of all criminal cases lodged in the CCWA[16] As set out in Table 1, while the total number of

12 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (Parliament of the Commonwealth of Australia, 2011) ('*Doing Time*') 7. For discussion of some of the theories of and key risk factors in Indigenous offending, see Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 55-73. For recent figures on adult Indigenous imprisonment rates and some possible responses, see Patricia Karvelas and Paige Taylor, 'Indigenous Prison Numbers Leap 84pc', *The Australian*, 12 December 2014, 8.

13 Australian Institute of Health and Welfare (AIHW), 'Youth Justice in Australia, 2012–13' (Bulletin No 120, AIHW, 2014). See also Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage: Key Indicators 2014* (Productivity Commission, 2014) 4.104-4.106.

14 Blagg, above n 4, 4.

15 WA Department of Corrective Services, 'Weekly Offender Statistics (WOS) Report as at 26 June 2014' (Government of Western Australia, 2014).

16 WA Department of the Attorney-General, *Report on Criminal Cases in the Children's Court of Western Australia 2008/09 to 2012/13* (2013); WA Department of the Attorney-General, *Report on Indigenous Defendants in the Children's Court of Western Australia*

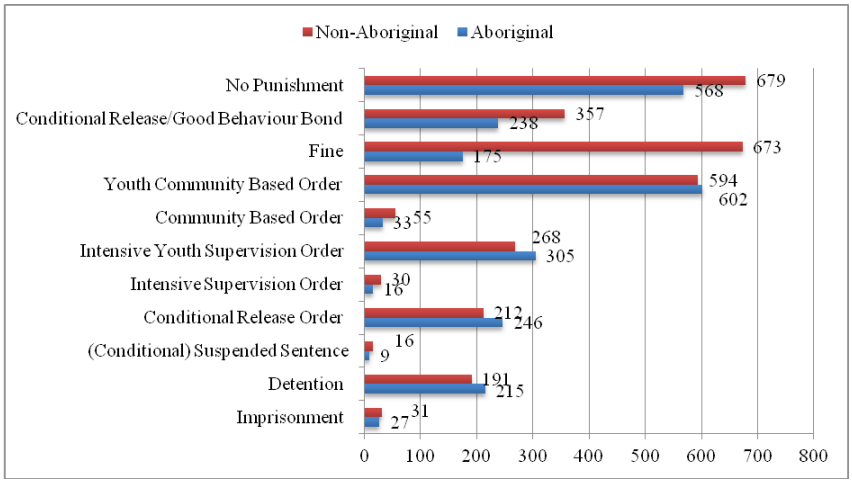
cases decreased by 37 percent over the five years to 2012-13, the number of cases involving Aboriginal young people only decreased by 27 percent. Furthermore, the total number of cases fell by 6 percent between 2011-12 and 2012-13, while the number involving Aboriginal young people *rose* by nearly 6 percent.

Table 1: Criminal cases lodged in CCWA, 2012-13

	Aboriginal			Total		
	N	% change 1 yr	% change 5 yrs	N	% change 1 yr	% change 5 yrs
Criminal cases lodged	3301	+5.7%	-27.0%	7211	-6.1%	-37.2%

Figure 1 sets out information on sentencing outcomes in the CCWA for 2012-13.[17] Aboriginal young people received 47 percent (27 out of 58) of the prison sentences and 54 percent (215 out of 406) of detention sentences, but only 21 percent of the fines (175 out of 848) and 40 percent of conditional release/good behaviour bonds (238 out of 595). They also received 46 percent of the 'no punishment' outcomes (568 out of 1247).

Figure 1: Sentences imposed in CCWA, 2012-13



Unsurprisingly, this over-representation of Aboriginal young people is also present earlier in the justice process. With respect to diversionary processes, data analysed by Loh et al in 2007 found that Aboriginal young people were less likely to be dealt with in this manner: they comprised 50 percent of young people arrested in WA, but only 29 percent of those who received a caution.[18]

2008/09 to 2012/13 (2013).

17 Ibid.

18 Nini Loh et al, *Crime and Justice Statistics for Western Australia: 2005* (Crime Research Centre, 2007). See also Blagg, above n 4, 8.

This is consistent with Blagg's assertion that 'Aboriginal young people have not benefited to the same extent as non-Aboriginal young people from diversionary initiatives and restorative justice'.[19] More recent data from the Productivity Commission[20] indicated that 35 percent of Aboriginal alleged young offenders in WA in 2012-13 were diverted through a caution or JJT, compared with 58 percent of non-Aboriginal alleged young offenders. Notably, the diversion rate for Aboriginal young people in WA rose from 30 percent in 2008-9 to 41 percent in 2011-12, while the rate for non-Aboriginal young people remained the same, at about 60 percent.

From a qualitative perspective, the challenges to Aboriginal children, their families and communities, the CCWA and the WA community are summarised in the following quote from CCWA Magistrate Potter:

> Indigenous youth in Western Australia are more likely to come into contact with police, they are more likely to be subject to care and protection proceedings, they are more likely to be remanded in custody, they are more likely to become enmeshed in formal court proceedings and outcomes and at an earlier age, they are over-represented in the juvenile justice system by 10 times and the numbers remain static and have done so for the past 20 years.[21]

In 2010, the Chief Justice, Wayne Martin, observed that Aboriginal juveniles in WA were 43 times more at risk of being detained than non-Aboriginal juveniles, the highest disproportion in Australia.[22] He called for 'more options to divert young Indigenous offenders to training programs near their communities', adding that '[l]ocking up young Aboriginal offenders in Perth is more expensive than putting them up at a plush hotel'. Clare et al[23] suggested that 'the biggest single issue currently facing the CCWA is that of Aboriginal over-representation, in both the [care and protection] and justice side of the Court functioning'.

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19 Blagg, ibid, 19. For further research indicating that Indigenous young people are less likely than non-Indigenous young people to receive a police caution, see Garth Luke and Chris Cunneen, *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System* (NSW Juvenile Justice Advisory Council, 1995); Lucy Snowball, 'Diversion of Indigenous Juvenile Offenders' (Trends and Issues in Crime and Criminal Justice No 355, Australian Institute of Criminology (AIC), 2008); Troy Allard et al, 'Police Diversion of Young Offenders and Indigenous Over-representation' (Trends and Issues in Crime and Criminal Justice No 390, AIC, 2010); Kelly Richards, 'Police-referred Restorative Justice for Juveniles in Australia' (Trends and Issues in Crime and Criminal Justice No 398, AIC, 2010); *Doing Time*, above n 12, 202-205; SCRGSP, above n 13, 11.19-11.28.

20 SCRGSP, ibid, 11.24.

21 Deen Potter, 'Indigenous Youth and Restorative Justice in Western Australia' (2010) 20 *Journal of Judicial Administration* 92, 96.

22 'Chief Justice Says Jail Not Working', *WA Today*, 30 March 2014 http://www.watoday.com.au/wa-news/chief-justice-says-jail-not-working-20100330-rb3t.html.

23 Clare et al, above n 2, 15.

Recent AIHW data[24] indicated that the rate of out-of-home care for Indigenous children was lower in WA than the national rate, at 53.3 and 57.1 per 1,000 children respectively. However, non-Indigenous children were also comparatively less likely to be in care (3.3 vs 5.4). In addition, in 2013-14:[25]

- Aboriginal children accounted for more than 50 percent of the children in care in WA, in spite of only representing 5.5 percent of the child population;
- The number of Aboriginal children in care increased by 9 percent (vs 4 percent for non-Aboriginal children);
- Aboriginal children were nearly nine times more likely to be the subject of substantiated abuse and harm than non-Aboriginal children; and
- 68 percent of Aboriginal children in care were placed in accordance with the ATSI Child Placement Principle described above. This is consistent with the national rate of 69 percent, but represented a slight decline from 73 percent in 2010-11.[26]

The reasons for the over-representation of Aboriginal young people in the WA juvenile justice and welfare systems are explored in more detail in Clare et al,[27] including:

- the legacy of colonisation and multi-generational trauma;
- higher rates of exposure to violence, death and serious illness; parental drug and alcohol use; admission to care; and institutionalised abuse;
- disproportionately high expenditure on correctional services;
- an absence of effective case management frameworks; and
- inadequate access to education and health services.

II PREVIOUS EMPIRICAL RESEARCH ON CHILDREN'S COURTS

As noted above, this section summarises relevant empirical research findings from studies involving interviews with youth justice judicial officers, evaluations of Indigenous youth courts, and the other jurisdictions in the national study.

24 Nicola Berkovic, 'Removal of Kids Horrifies Judge', *The Australian*, 11 December 2014, 5.

25 WA Department for Children Protection and Family Support, *Annual Report 2013-14* (2014).

26 For an example of a new model of care developed in WA with the specific purpose of enhancing sustainable relative care for Aboriginal children in care, see Mike Clare and Ann Oakley, '"Who's My Mob?" Searching for Long-term Extended Family Placements for Aboriginal Children in Care', *Communities, Children and Families Australia* (under review).

27 See Clare et al, above n 2, 16-19, 52-59.

A Interviews with Judicial Officers

As recently discussed by Borowski,[28] there have been a number of international studies involving research with judicial officers in the Children's Court (or equivalent) jurisdiction. However, none expressly considered the issue of racial or Indigenous status. Furthermore, prior to the national study, the empirical research on Australian Children's Courts was limited; only one study[29] involved interviews with judicial officers, and this was related specifically to the child protection jurisdiction, with no consideration of criminal justice issues.

B Indigenous Youth Courts

As discussed by Marchetti and Daly,[30] most jurisdictions in Australia have some form of Indigenous sentencing court, albeit generally limited to adult offenders. The purposes of such courts are to:

- address the overrepresentation of Indigenous people in the criminal justice system;
- increase Indigenous participation in the justice system as court staff and advisers, as well as identifying ways for Indigenous communities

28 As discussed in Borowski (2013a), above n 1, 270-271, see: Howard Parker, Maggie Sumner and Graham Jarvis, *Unmasking the Magistrates: Custody-or-not Decision in Sentencing Young Offenders* (Open University, 1989); Sheila Brown, *Magistrates at Work* (Open University, 1991); Gordon Bazemore and Lynette Feder, 'Rehabilitation in the New Juvenile Court: Do Judges Support the Treatment Ethic?' (1997) 21 *American Journal of Criminal Justice* 181; Gordon Bazemore and Lynette Feder, 'Judges in the Punitive Juvenile Court' (1997) 14 *Justice Quarterly* 87; Gordon Bazemore, 'Crime Victims and Restorative Justice in Juvenile Courts: Judges as Obstacle or Leader?' (1998) 1(1) *Western Criminology Review*, available at http://www.westerncriminology. org/documents/WCR/v01n1/Bazemore/Bazemore.html; Tennessee Commission on Children and Youth, 'Judges Express Opinions on Child Protective and Juvenile Justice Systems (1999) 9(2) *The Advocate* 1; Brandon Applegate et al, 'Individualization, Criminalization, or Problem Resolution' (2000) 17 *Justice Quarterly* 309; Leslie Leip and Gordon Bazemore, 'Victims' Needs, Restorative Justice and the Juvenile Court' (2000) 15 *Journal for Juvenile Justice and Detention Services* 47; Anthony Doob, *Youth Court Judges' Views of the Youth Justice System* (University of Toronto, 2001); Joseph Sanborn, 'A *parens patriae* Figure or Impartial Fact Finder? Policy Questions and Conflicts for the Juvenile Court Judge' (2001) 12 *Criminal Justice Policy Review* 311; Jane Sprott and Anthony Doob, 'Two Solitudes or Just One? Provincial Differences in Youth Court Judges and the Operation of Youth Courts' (2002) 44 *Canadian Journal of Criminology* 165; Allan Borowski and Mimi Ajzenstadt, 'A Solution Without A Problem' (2005) 45 *British Journal of Criminology* 183; Aaron Kupchik, *Judging Juveniles* (NYU Press, 2006); Jo Phoenix, 'Pre-sentence Reports, Magisterial Discourse and Agency in the Youth Courts in England and Wales' (2010) 12 *Punishment and Society* 348.

29 Rosemary Sheehan, *Magistrates' Decision-making in Child Protection Cases* (Ashgate, 2001).

30 See Elena Marchetti, 'Indigenous Sentencing Courts' (Brief No 5, Indigenous Justice Clearinghouse, 2009);. See also *Doing Time*, above n 12, 236-240; Kathleen Daly and Elena Marchetti, 'Innovative Justice Processes: Restorative Justice, Indigenous Justice and Therapeutic Jurisprudence' in Marinella Marmo, Willem de Lint and Darren Palmer (eds), *Crime and Justice: A Guide to Criminology* (Thomson Reuters, 4th ed, 2012) 455, 462-463.

to resolve disputes and deal with offenders in ways that are culturally appropriate; and

- complement Indigenous Justice Agreements, which recognise the need for partnerships between state governments and Indigenous organisations in order to improve justice for Indigenous people.

To date, evaluations of such courts have found that they provide a more culturally appropriate sentencing process than mainstream courts and facilitate greater involvement by Indigenous offenders and their communities, which may in turn help to build the trust of Aboriginal children and their families and communities in the criminal justice system, but they have not had a significant impact on recidivism.[31]

There are currently Indigenous youth courts in Victoria, Queensland and the Australian Capital Territory (ACT). In November 2014, it was announced that New South Wales (NSW) would introduce its first Koori Youth Court. The 12 month trial will commence in January 2015 and 'could be introduced in other locations if the program is successful'.[32]

Borowski conducted an evaluation of the Victorian Children's Koori Court (VCKC) and found that 60 percent of participants had charges proven in further summary appearances after the conclusion of their initial appearance in the VCKC.[33] Overall, 79 percent were found to have reoffended, although the new offence was less serious than the initial offence in 43 percent of cases. By contrast, the new offending was of similar seriousness in 24 percent of cases, and more serious in 33 percent of cases. Borowski concluded that although the recidivism rate of 60 percent was high, it compared favourably with the recidivism rate for Indigenous youth in two previous studies using the same measure of reoffending (namely, 65 and 78 percent). Furthermore, he saw the VCKC as 'an important vehicle for satisfying the demands by Indigenous people for a more effective legal system … [and] a significant means for empowering and strengthening Indigenous communities and transforming their relationships with "White" society'.[34]

He later noted that '[a] feature of virtually all [VCKC] hearings was their highly supportive and caring nature. The magistrates went to considerable effort to affirm or validate the defendants—to identify and underscore their strengths'.[35] He also found that the magistrates 'directed the hearings with a gentle and dignified hand

31 For a summary of these evaluations, see Marchetti, ibid; Daly and Marchetti, ibid, 466-467.

32 Mohamed Taha and Allan Clarke, 'NSW's First Koori Youth Court to Target Indigenous Imprisonment Rates in Western Sydney Trial', *ABC News*, 15 November 2014 http://www.abc.net.au/news/2014-11-13/koori-youth-court-to-target-indigenous-imprisonment-rates/5889720.

33 Allan Borowski, 'Indigenous Participation in Sentencing Young Offenders' (2010) 43 *Australian and New Zealand Journal of Criminology* 465.

34 Ibid 482.

35 Allan Borowski, 'In Courtroom 7: The Children's Koori Court at Work' (2011) 55 *International Journal of Offender Therapy and Comparative Criminology* 1110, 1121.

and less formal manner than proceedings in the mainstream Children's Court'.[36] He determined that the VCKC was implemented in accordance with its design, although he made six recommendations for improving its processes. In addition, it had realised its objectives of:

- contributing towards building a culturally responsive juvenile justice system for Koori young people;
- fostering positive participation by Koori young people and their families and community in the court process and the Koori community's increased accountability for young people; and
- promoting Koori community awareness of community codes of conduct and standards of behaviour.

Morgan and Louis[37] conducted an evaluation of the Queensland Murri Court. The key findings in respect of the Youth Murri Court (YMC) were:

- it was utilised as an 'early intervention' court, in an attempt by Elders to engage with young people and reduce the risk of further offending behaviour that might lead to incarceration;
- a greater level of support was offered to Indigenous offenders post-sentence in the YMC than in the mainstream Children's Court;
- the proportion of YMC participants who failed to appear before court was lower than for a comparable cohort in the Children's Court;
- appearing in the YMC had no short-term impact on reoffending patterns; and
- the process was successful in increasing the Indigenous community's participation in the court process, improving perceptions of fairness and cultural appropriateness, and increasing stakeholders' collaboration.

It should be noted that the Queensland Murri Court was abolished in 2012, but the Indigenous Sentencing List now operates in 11 locations across Queensland, including in the Children's Court.[38]

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36 Ibid 1125.

37 Anthony Morgan and Erin Louis, 'Evaluation of the Queensland Murri Court: Final Report' (Technical and Background Paper No 39, Australian Institute of Criminology, 2010).

38 Queensland Department of Justice and Attorney-General, *Indigenous Sentencing List* (2012) http://www.courts.qld.gov.au/__data/assets/pdf_file/0008/205586/cip-fs-indigenous-sentencing-list-isl.pdf. According to Chris White, Executive Director of the Queensland Courts Innovation Programs, this program is 'very similar' to Murri Court, but 'provides additional support and referrals to program[s]' and 'assists in addressing the underlying causes of a defendant's criminality', as 'offenders can be referred to services as part of their bail undertaking, including drug or alcohol rehabilitation, work readiness courses or enduing offending programs': see cited in Lorana Bartels, 'Indigenous-specific Court Initiatives' (Indigenous Justice Clearinghouse, forthcoming).

C The National Study

According to Borowski,[39] the national study was seen as unique because it was national in scope and sought the views of the judicial officers, which no prior study had done. He identified the following as the national study's key findings on Indigenous issues:

- study participants confirmed the over-representation of Indigenous Australians among the clientele of Children's Courts;
- focus groups with lawyers identified difficulties in accessing legal representation, 'especially for Indigenous clients';[40]
- some participants recommended qualified interpreters and recognised the need for training in cross-cultural professional practice in areas with a large Indigenous clientele; and
- WA commented on the lack of consultation between government and Indigenous communities, while Victoria showed an example of good practice in this regard.

Borowski identified as a major issue 'the under-resourcing of the youth justice and child welfare systems, a situation which impacted on the operation of the court and, hence, its ability to fulfil its purposes…particularly …in the geographically larger States and Territories with large Indigenous populations'.[41] He also noted that participants' views on the issue of Indigenous young people in the justice system largely revolved around the need for Indigenous sentencing courts, although many acknowledged that evaluations had shown they do not reduce recidivism (as discussed above). Nevertheless, participants in Victoria and Queensland 'were generally positive about the value of Indigenous Children's Courts'[42] and the ACT reported increasing use of the Ngambra Circle Sentencing Court (as it was then known; now the Galambany Circle Sentencing Court). In NSW, magistrates were supportive of the Nowra Care Circle, a pilot court-referred intervention for welfare matters, and there was some reflection on the need for Indigenous sentencing courts. In the Northern Territory and WA, by contrast, Borowski noted that judicial officers were cautious about introducing similar sentencing practices. In his conclusion, Borowski asserted that the findings of the project pointed, *inter alia*, to the need 'for the greater use of Indigenous Children's Courts and sentencing circles'.[43] The issues of establishing specific Indigenous sentencing courts and the lack of government/community consultation will be discussed in more detail below.

39 Borowski (2013a), above n 1.
40 Ibid 277.
41 Ibid 280.
42 Ibid 282.
43 Ibid 285. The *Doing Time* report, above n 12, suggested there was a 'need to fund more Indigenous sentencing courts in Australia, including outside metropolitan areas', but also noted that the success of such courts 'requires the existence of programs that assist clients in fulfilling their sentences and contribute to their rehabilitation': 238-239.

The research team in each jurisdiction contributed a chapter on its key findings to Sheehan and Borowski's edited collection.[44] In addition, some jurisdictions have published reports (NSW,[45] WA[46] and the ACT[47]) and/or journal articles (Victoria[48] and the ACT[49]). The following summarises the key findings in relation to Indigenous young people, in addition to Borowski's observations above. The discussion on WA will be presented in the findings section below.

1 NSW

Fernandez et al's[50] key findings in respect of Indigenous young people were:

- respondents acknowledged that the Indigenous population of NSW faces particular barriers to accessing and negotiating the system, with a major deficit in resources and a need for services controlled and run by Indigenous workers and communities;
- the over-representation of Indigenous young people was seen as due in part to the lack of culturally appropriate responses and services, especially in relation to young people with mental health problems;
- there is a perceived lack of understanding of Indigenous family structures and a tendency to apply ethnocentric views of parenting in assessing care matters;
- the Aboriginal Legal Service (ALS) was seen as underfunded and understaffed, with inequities in access to legal representation, which may in turn impact on court outcomes;
- bail is used more frequently than cautions in this population group, even though Indigenous families may not be able to afford bail, fines or legal representation
- Indigenous families face systemic disadvantages accessing and

44 Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013).

45 Elizabeth Fernandez et al, *A Study of the Children's Court of New South Wales: Part of A National Assessment of Australia's Children's Courts* (University of New South Wales, 2014).

46 Clare et al, above n 2.

47 Peter Camilleri, Morag McArthur and Lorraine Thomson, *A National Assessment of Australia's Children's Courts: ACT Report* (Institute of Child Protection Studies, 2011).

48 Allan Borowski and Rosemary Sheehan, 'Magistrates' Perspectives on the Criminal Division of the Children's Court of Victoria' (2013) 66 *Australian Social Work* 375; Rosemary Sheehan and Allan Borowski, 'Australia's Children's Courts: An Assessment of the Status of and Challenges Facing the Child Welfare Jurisdiction in Victoria' (2014) 36 *Journal of Social Welfare and Family Law* 95.

49 Peter Camilleri, Lorraine Thomson and Morag McArthur, 'Needs or Deeds? Child Protection and Youth Justice in the Australian Capital Territory' (2013) 35 *Journal of Social Welfare and Family Law* 194.

50 Elizabeth Fernandez et al, ' The Children's Court in New South Wales' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 27; Fernandez et al, above n 45.

negotiating the systems that intervene in their lives because of language barriers and poor levels of education;

- there was strong support for the Nowra Care Circle Pilot, an initiative in the welfare jurisdiction that promotes the participation, understanding, and self-determination of the Indigenous community;[51]
- some participants critiqued the adversarial model of the Children's Court in relation to its suitability for Indigenous families and young people, as well as the broader population;
- there was unanimous support from research participants for increased consultation with Indigenous communities about the barriers facing Indigenous communities and young people;
- more Indigenous juvenile justice officers, field workers and court staff are required;
- Indigenous sentencing courts were seen as examples of possible improvements; and
- cultural training is required to understand Indigenous culture, mental health issues, and the impact of low socio-economic status. In particular, it was suggested that all personnel associated with the Children's Court, including the welfare and police caseworkers receive more cultural training to improve practice with Indigenous young people and families.

2 Victoria

Borowski and Sheehan[52] found that participants focused almost exclusively on the VCKC, which was perceived as an effective response to Indigenous young people's offending, even though it did not reduce reoffending. This was because the Elders provided an opportunity for better engagement with young people and their families and it was seen as a culturally appropriate way of dealing with Indigenous young offenders and strengthening their cultural identity. Regional magistrates and four focus groups supported the expansion of the VCKC into additional sites. Another issue that was identified, however, was the need for appropriate and accessible support service post-court, with one magistrate suggesting that the CKC process is otherwise 'a complete waste of time'.[53]

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51 See NSW Justice and Attorney-General, *Care Circles: Children's Court Care Circles for Aboriginal Kids and Their Families* (2009) http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/Care_Circles_Dec09_ web.pdf/$file/Care_Circles_Dec09_web.pdf.

52 See Borowski and Sheehan, above n 48; Allan Borowski and Rosemary Sheehan, 'The Children's Court of Victoria' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 123; Sheehan and Borowski, above n 48.

53 Borowski and Sheehan, ibid, 386. See also *Doing Time*, above n 12, 239, as discussed in fn 43.

3 Queensland

Tilbury and Mazerolle noted the issue of Indigenous over-representation in both the youth justice and protection domains. According to the participants in their study, the 'provision of targeted, community-based support services for these children, young people and their families was not … sufficient to address the social disadvantages that cause over-representation'.[54] There was a suggested need for more intervention programs designed and run by Indigenous community groups, as well as services for Indigenous families and a more therapeutic approach overall.

As noted above, the YMC was abolished in 2012, but a similar process currently operates in the form of Indigenous Sentencing Lists. Interviewees were reported to be 'generally positive' about the YMC, especially in relation to the involvement of Indigenous Elders and the pre-sentence programs available in some locations. However, there was concern about the lack of continuity with Indigenous representation and variations in practice in different locations.

4 South Australia

The only consideration of Indigenous issues was the finding that '[r]epresentatives from Aboriginal legal rights expressed a high level of concern that the design of the Court was unsuitable for Aboriginal young people'.[55] The lack of services and resources in remote areas such as the Anangu Pitjantjatjara Yankunytjatjara Lands (where a high proportion of residents are Indigenous) was also noted.

5 Tasmania

There is currently an Indigenous diversion program on Clarke Island and a number of Indigenous detainees have reportedly been moved from the Ashley Detention Centre to this program. The only relevant finding was that one magistrate suggested this would be an appropriate intervention for Indigenous young people in general, as 'a lot of these kids need role models, need to be challenged, they need to be taken out to the bush for a while and basically set some challenges and achieve them'.[56]

6 Northern Territory

Although the overwhelming majority of young people in the Northern Territory justice system are Indigenous, there was little specific discussion of Indigenous issues by West and Heath.[57] However it was noted that there was significant social

54 Claire Tilbury and Paul Mazerolle, 'The Children's Court in Queensland: Where To From Here?' In in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 65, 74.

55 Daniel King, Andrew Day and Paul Delfabbro, 'The Children's Court of South Australia' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 84, 95.

56 Max Travers, Rob White and Michael McKinnon, 'The Children's Court in Tasmania' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 103, 118.

57 Deborah West and David Heath, 'Youth Justice, Child Protection and the Role of the

inequality, a lack of options in relation to bail and that young people often came from diverse cultural backgrounds and isolated areas.

At the time of the interviews, the Northern Territory had community courts; these were in many respects similar to Indigenous sentencing courts, although they were not in fact restricted to Indigenous offenders. Community courts 'were identified by participants as a potentially effective method of working with young offenders'.[58] However, one participant suggested that introducing Indigenous courts for young offenders might assist in generating resources and interest, as s/he felt that the community courts were 'stagnating'. This observation appears to have been prescient, as the community courts were abolished in 2012.[59]

7 ACT

Most participants identified the over-representation of Indigenous young people as 'problematic'.[60] The need for more care workers with appropriate backgrounds for working with Indigenous young people was identified as a priority. There was also a perceived need for appropriate legal representation in the criminal justice context, with two participants expressing concern that some young people are remanded in custody due to a lack of appropriate representation. The expansion of the Ngambra (now Galambany) Circle Sentencing Court was seen as a way of responding to the community needs of Indigenous young people. In the welfare jurisdiction, 'the development of Indigenous cultural plans for children was seen as a step in the right direction'.[61] However, some participants felt there was not always the expertise available to make sure that the plans were appropriate. In addition, there was some concern that parties in welfare matters avoided relevant issues and sought not to be seen as critical. As a result, they may not address the situation the child is in and children may remain at risk.

Youth Courts in the Northern Territory' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 45.

58 Ibid 60.

59 See Bartels, above n 38.

60 Camilleri, McArthur and Thomson, above n 47, 12; Peter Camilleri, Lorraine Thomson and Morag McArthur, 'The Childrens Court in the Australian Capital Territory' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 9, 24.

61 Camilleri, Thomson and McArthur, ibid, 20.

III THE WA COMPONENT OF THE NATIONAL STUDY

A Method

As set out in more detail by Clare et al,62 there were 74 participants in the WA component of the study. Interviews were conducted with all six judicial officers from the Perth Children's Court and six magistrates based in country areas between 11 June and 12 November 2010. In addition, there were focus groups with 62 stakeholders from the following organisations:

- Aboriginal Legal Service (n=18);
- Legal Aid (n=15);
- Department for Child Protection (n=10);
- WA Police (n=3);
- Family Inclusion Network of WA (n=2);
- Youth Justice, Department of Corrective Services (n=11);
- Salvation Army (n=1); and
- academia (n=2).

Fifty-nine participants (80%) lived in the Perth metropolitan area, 14 (19%) lived in regional/country WA and one (1%) lived in Melbourne, but had previously been based in metropolitan Perth.

In preparation for the study, 12 unstructured interviews were conducted with key professionals in the Departments of the Attorney-General, Corrective Services and Child Protection, as well as the Office of the Inspectorate of Custodial Services and locally-based academic practitioners and researchers. These interviews helped to identify the key issues of relevance to the CCWA and which agencies and individuals should be invited to participate. Ethical approval for the project was obtained from the University of Western Australia's Human Research Ethics Committee, as well as key agencies and stakeholders.

The interviews and focus groups utilised the same questions as the national methodology,[63] supplemented by additional state-specific questions. The only

62 Clare et al, above n 2, 20-21. See also Spiranovic, above n 2, 152-153. A number of changes have been made since conducting this research including updating of courthouses and changes to police practices that may have an impact on the operation of the CCWA (DotAG, personal communication, 12 January 2015). The authors will endeavour to further explore the changes that have occurred since 2010 and judicial officers' and other stakeholders' perceptions of the impact of these changes in future research. The Department of the Attorney General had a number of other small suggested cases which largely relate to recent changes but it sounds as though it is too late really for any further changes and in any case I think the recent changes made would be best addressed in a new and separate publication.

63 See Clare et al, ibid, 47-51.

question relating to Indigenous issues in the national questionnaire was: 'Children's Indigenous Courts now exist in several states. How well do you think these courts work? In what ways could the court process be improved for Indigenous people?'

In addition, the 12 judicial officers in WA were asked:

- What are your views on the disparities in the number of Indigenous and non-Indigenous young offenders who are:
    - granted bail?
    - sentenced to detention?
- What needs to happen in order to reduce the number of Indigenous young people who are denied bail and who are sentenced to detention?
- What are your views on the high number of Indigenous young people being placed in care? In your opinion, are the care arrangements for these young Indigenous people satisfactory?
- What additional personnel do you think the relevant agencies could provide to the Court to assist in making the Court operate more effectively with respect to:
    - the Child Welfare Jurisdiction; and
    - the Youth Justice Jurisdiction?

In respect of the last question, the research team prompted participants about a range of issues, including 'participation of Indigenous community members'.

B Findings and Discussion

Indigenous issues were a much greater focus in WA than in any of the other jurisdictions. The following highlights particular areas of focus within the WA study.

1 The Children's Court Today

There was a generalised concern that the absence of appropriate services for children and families across both criminal and protective jurisdictions has serious implications for the operation and status of the CCWA. In this regard, the responses echoed concerns expressed by study participants in NSW, Queensland and South Australia. The absence of service options was seen as particularly marked in rural WA, impacting most severely on Aboriginal children, who constitute the vast majority of clients. Across both protective and criminal jurisdictions, children are denied access to experienced, professionally qualified staff and crucial facilities such as bail hostels, mental health, specialised therapeutic, health and educational facilities.

In addition to these challenges, the country-based magistrates reported the particular difficulties associated with the generic responsibilities of their role, covering both adult and child matters, and the enormous geographical areas they are required to service. Once again, Aboriginal communities were most affected by the limitations of time, court facilities and legal representation, pre- or post-court services and, in many cases, the communication difficulties associated with the absence of suitably qualified professional interpreters. Regrettably, this issue is likely to get worse with the recent decision to stop funding WA's only Aboriginal interpreting service. The Chief Justice has 'slam[med]' the decision, arguing that it has the potential to 'undermine the fairness of the justice system'[64] and that the service should instead be extended.[65] The decision also runs counter to the *Doing Time* recommendation to establish and fund a national interpreter service, with full services to be available nationwide by 2015.[66]

Given the severity of problems of which juvenile offending and child protection concerns are symptomatic in rural and remote Aboriginal communities in WA, there are immense pressures placed on country magistrates to intervene effectively in the interests of children and/or the community. As one magistrate noted:

> there is no community work service available; no counselling available; no violence or substance abuse programs. All you are left with in youth community-based order[s] is reporting, and reporting is perhaps once every two months by telephone. That is the extent of the order – it is just absolutely useless...

Another observed:

> These kids have significant problems. I have talked to you about the poverty and the dysfunction in the family. A lot of these kids have suffered significant trauma in their young lives ... many of them don't have a parent or caregiver who is still around – there may be a parent in jail. All of these life circumstances that are deeply traumatic, …almost to a person, they've witnessed domestic violence of a serious kind. There is nothing here, and there is so much trauma in this community.[67]

Reflecting on the thresholds for protective intervention in rural and remote regions, some judicial officers expressed concern that much lower standards were deemed acceptable for Aboriginal children in remote communities.[68] Three key

64 Lucy Martin, 'WA Chief Justice Slams End to Funding of Aboriginal Interpreting Service', *ABC News*, 17 November 2014 http://www.abc.net.au/news/2014-11-17/wa-chief-justice-funding-aboriginal-interpreting-service-kis/5897222.

65 'WA Chief Justice Says Indigenous Interpreting Services Must Be Expanded', *ABC News*, 17 November 2014 http://www.abc.net.au/news/2014-11-17/wa-chief-justice-says-indigenous-interpreting/5897924.

66 *Doing Time*, above n 12, Recommendation 25.

67 A similar picture was painted by magistrates and other stakeholders across Australia in *Doing Time*, ibid, 215-216.

68 This view has also been expressed by the Chief Justice, who stated in 2012 that 'there was no doubt some Aboriginal children were living in appalling conditions by agreement with

reasons were cited for this acceptance:

- the 'tyranny of distance', and relative invisibility of Aboriginal children, which is compounded by the general impoverishment that makes it hard to distinguish between circumstantial outcomes and deliberate abuse or neglect;
- the transience and inexperience of child protection workers, who are ill-equipped to assess children's circumstances or intervene effectively; and
- the over-rigid interpretation of Aboriginal Child Placement Principles, in the face of long-standing political imperatives in WA to avoid repeating the mistakes associated with the Stolen Generations[69] of Aboriginal children removed inappropriately from family and community.

Noting how complex and fraught decision-making 'in the child's best interest' is under such circumstances, one judicial officer reflected:

> If you go to some communities and observe the [physical and emotional] conditions that young children are in… there is good argument that there actually should be more young children in care. There is good argument that the bar is really too low. Whether the child is an Aboriginal child or a non-Aboriginal child – if that child is in a situation where his or her well-being is at risk, then they should receive care.

2 Training For Judicial Officers and Other Stakeholders

As in NSW, many participants noted that most court personnel, including judicial officers, would benefit from education in working across cultures with Aboriginal people and communities (as well as the growing population of refugee and culturally and linguistically diverse communities).

There was also a broad recognition of the need for police officers to be better educated about the discretion available to them under the law. For instance, the common practice of imposing a curfew as a condition of bail was also criticised, and the need expressed for police officers to be better informed about the implications for children's wellbeing of the inappropriate use of these interventions, particularly with Aboriginal children in rural communities.[70]

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children protection authorities': Debbie Guest, 'WA's Top Judge Wayne Martin Slams Child Protection Policies As Harmful To Aboriginal Kids', *The Australian*, 31 August 2012 http://www.theaustralian.com.au/national-affairs/was-top-judge-wayne-martin-slams-child-protection-policies-as-harmful-to-aboriginal-children/story-fn59niix-1226462008501.

69 See Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (HREOC, 1997) for background. It should be noted that it was recently reported that Australia's only Indigenous federal judge was 'hugely concerned' that current rates of removal of Aboriginal children and 'if this keeps going, it will eclipse the Stolen Generation': Berkovic, above n 24, 5.

70 In this context, it should be noted that the *Doing Time* report recommended the development of a national framework to provide comprehensive Indigenous cultural awareness training for all police employees that promotes better understanding and relations between

3 Court Facilities

As noted above, study participants in South Australia were concerned that the design of the Children's Court was unsuitable for Aboriginal young people. Court facilities were also an issue of concern in WA. Despite being located within the capital city, there were criticisms of the court facilities in Perth. This said, the facilities outside of Perth, which predominantly service Aboriginal clients, were perceived to be far worse. Participants described some facilities, particularly in temporary circuit courts in rural and remote settings as 'poor to dreadful', with some lacking any facilities at all. The absence of waiting rooms or toilets was a particular concern, given the harsh climates in some remote regions of WA, a difficulty compounded by the frequently very long waiting periods in hearings where adult and child matters are dealt with together. In these settings, there is also no opportunity for lawyers to have confidential conversations with clients, further exacerbating the difficulties associated with the overlap between adult and children's hearings. All of these difficulties are further compounded by the reported confusion in more remote settings as a result of poor communication facilities, causing additional people to attend hearings just in case their participation might be required. Once again, many judicial officers and other stakeholders noted that the population most impacted by these impoverished, overcrowded and confusing hearings are Aboriginal children and families. The injustice of this situation was highlighted by one stakeholder, who commented:

> There's issues with Kununurra, there's issues with Broome and Derby, Roebourne, Carnarvon, Geraldton [and] Northam is terrible. [In] Kalgoorlie, the Court facilities are just extraordinarily bad; Hedland is not much chop. Every which way you turn, there are problems. And these are the major courts in the state ... what it all conspires to me is that Aboriginal people in this state are given less support and justice than the rest because Aboriginal people comprise the vast majority of arrests, especially in these places.

4 Clients and Cases

When discussing the clients and cases brought before them, judicial officers focused predominantly on young offenders, talking only briefly and generally about the increase in the complexity of family circumstances leading to protective matters coming before the court. There was, however, an acute awareness of the over-representation of Aboriginal children across both jurisdictions, with some children moving between the two courts because of the connections between their protective needs and their offending behaviour. The significance of the nexus was recognised in the *Doing Time* report, where it was suggested that '[s]upporting families is key to opening positive pathways for Indigenous youth at risk and

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police and Indigenous communities; addresses the specific circumstances of Indigenous youth over-representation in police contact; and outlines the diversionary options that are available, and the positive impact that diversion can have: *Doing Time,* above n 12, Recommendation 23.

halting the intergenerational entrenchment in the criminal justice system'.[71]

A number of participants were aware that the Court was responding, in a very limited way, to behavioural symptoms of longstanding issues of disenfranchisement, impoverishment and despair amongst Aboriginal people. In this context, some judicial officers spoke about foetal alcohol syndrome (FAS), the impact of which is beginning to be felt across both the criminal and protective jurisdictions.[72] A submission to the *Doing Time* inquiry suggested the condition affected nearly three in every 1000 live births of Indigenous children in WA[73] and the report recommended that all Indigenous young people who enter the criminal justice system should receive comprehensive health screening, including for FAS.[74] Significantly, a CCWA magistrate recently called for FAS to be explicitly recognised as a mitigating factor in sentencing.[75]

Another worrying trend noted by judicial officers was what might be described as the 'criminalisation of welfare issues', as demonstrated in instances where young children, particularly Aboriginal children in remote regions, were frequently arrested for breaking and entering houses to obtain food or to seek a safe refuge from the domestic violence occurring within the home. Reflecting on the circumstances of Aboriginal children brought before the Court, one judicial officer noted the crucial need to contextualise their behaviour and recognise their needs:

> They are not educated; they have no role models; they are really tragic ...They are just really deprived children and I think the community is very quick to judge them ... There is a lot of judgmental discussion about a lot of the offenders we see, where in fact those children are totally screaming with pain. They may have mental health problems. They may have sexual abuse problems. They may have serious drug problems. They might just be in terrible households. They might be wards of the state... it's really terrible. I characterise them as being very disadvantaged.

As noted above, there was concern expressed about the operation of bail in NSW, the Northern Territory and the ACT. Judicial officers in WA also expressed

71 Ibid 51.

72 For discussion, see *Doing Time*, ibid, 96-101; Heather Douglas et al, *Fetal Alcohol Spectrum Disorders (FASD) within the Criminal Justice Sector in Queensland* (University of Queensland, 2013); House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm – Inquiry Into The Prevention, Diagnosis and Management of Foetal Alcohol Spectrum Disorders* (Parliament of the Commonwealth of Australia, 2012).

73 *Doing Time*, ibid, 97.

74 Ibid Recommendation 15. See also Recommendation 9, which called for a comprehensive inquiry into FAS. It appears that the 2012 report of the House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 72, gave effect to this recommendation.

75 Emily Moulton, 'Perth Magistrate Catherine Crawford Wants Fetal Alcohol Spectrum Disorder Classed As Disability', *PerthNow*, 12 July 2014 http://www.perthnow.com.au/news/western-australia/perth-magistrate-catherine-crawford-wants-fetal-alcohol-spectrum-disorder-classed-as-disability/story-fnhocxo3-1226986741454.

concern about the increased tendency amongst police officers to arrest, rather than summons, young offenders and to stipulate stringent conditions for bail, such as curfews or school attendance, regardless of the relevance or appropriateness of such conditions.[76] Once again, participants noted the particular issues faced by Aboriginal children in regional WA placed on bail. Three issues of concern were highlighted, namely:

- the failure to recognise underlying personal and social problems associated with persistent minor offending, and the unrealistic expectations associated with maintaining a curfew and/or meeting requirements such as school attendance;
- the lack of resources and 'responsible adults' to support bail in rural and remote areas; and
- the severe and potentially traumatic consequences of breaching bail given the absence of secure facilities outside of Perth, resulting in children being transported great distances to be held in adult facilities or placed in the Perth remand centre.[77]

Although concerns were widely raised about the bail conditions, there was no great impetus for legislative change, as the focus of concern was on the interpretation and application of the legislation, and a cultural move away from application of discretionary diversion. Some stakeholders highlighted the need for many more bail hostels in regional settings, so that children could stay within their communities. This proposal echoes Chief Justice Martin's call for 'the creation of culturally appropriate bail initiatives – including residential places'[78] and Blagg's suggestion that:

> a new initiative is required [in WA], involving local Aboriginal communities and representative organisations in the regions and the metropolitan area, to create some new safe options for children, including placement with other families/communities and appropriate supervised accommodation.[79]

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76 See also Blagg, above n 4, 10; see also Weatherburn, above n 12, 93-97.

77 For examples of this, see Blagg, ibid, 25. For discussion of the unequal adverse impact of bail laws on Indigenous young people, see *Doing Time*, above n 12, 219-229.

78 Blagg, ibid, 10. To this end, see Clare and Oakley, above n 26, 4 for discussion of the Kinship Connections practice model, 'which sets out to search for and identify extended family carers who will offer a permanent placement for a referred family member(s). The well-being of the child is uppermost in this practice model which is demonstrably "in the child's best interests"'.

79 Ibid. See also *Doing Time*, above n 12, 75-85. Recommendation 7 called for a Commonwealth commitment to ensuring all states and territories expand the number and range of safe and gender-appropriate accommodation options for Indigenous children and young people, including extended family houses, identified safe houses, hostel and school accommodation, foster and respite care, and emergency refuge accommodation. It was also proposed that 'the Attorney-General take to the Standing Committee of Attorneys-General the proposal to increase funding for appropriate accommodation options for youth who are granted bail, in order to prevent the unnecessary detention of Indigenous youth':

Participants in our study also suggested that a list of potential custodians should be developed with local Aboriginal communities in advance, so that a responsible adult can be identified for young Aboriginal offenders when and where the need arises.

5 Clients' Understanding of the Court Process

Like study participants in NSW, a number of WA judicial officers raised concerns about the capacity of people before the Court to understand and fully participate in court processes, and this was a particular concern for participants who do not have English as their first language.[80] It was suggested that the court process and legal language is alien to the majority of young people and their families, and the very limited contact time with legal representatives available to most people across both criminal and protective jurisdictions is insufficient to facilitate informed participation. One stakeholder reported:

> I had a client, we'd been to Court three or four times, and finally he said to me "what just happened?" He'd been to Court three or four times… back and forward, back and forward … He came out saying, "what just happened?" At that moment I realised that his lawyer needed to be telling him in words he could understand, that I needed to be telling him in words he could understand, that the Court *didn't know* that he didn't understand (emphasis added).

Once again, the question of informed participation was noted as a particular issue for Aboriginal children and families from rural and remote regions.[81] It was argued that the difficulties with understanding went beyond language for these children and families; instead, they reflected significant cultural issues, with many clients unable to understand the philosophy of the Court. Judicial officers expressed concern at the disadvantages and potential discrimination faced by these populations in the absence of trained and skilled interpreters and culturally literate legal practitioners able to assist them linguistically and culturally to participate in the court process.

6 Indigenous Sentencing Courts

As noted above, the study participants in NSW, Victoria, Queensland, the Northern Territory and the ACT focused significantly on Indigenous sentencing courts and there was generally strong support for their introduction and/or expansion. Although judicial officers in WA were aware of the successful introduction of Indigenous Courts in other jurisdictions, they were cautious about their utility in WA. They noted the diversity of the Aboriginal population, and commented on the culture of feuding between many families and communities that would

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Recommendation 27.

80 For discussion of the language barriers Indigenous young people in the justice system may face, see *Doing Time*, ibid, 205-210.

81 Another significant and growing population about whom concern was expressed was recently arrived African refugees.

impede their effectiveness. One judicial officer noted that '[t]he usual problem is that not all Aboriginal people are the same. In fact, they often resent and hate various other Aboriginal groups more than they hate the Whites'. Blagg has acknowledged that it 'may not currently be feasible to import the Koori Children's Court model into Western Australia',[82] but suggested that there are elements of the model that could be adopted, describing as 'crucial' the role of the Koori Justice Worker, who acts as a link with the local Indigenous community and engages with families and young offenders. He also pointed to the role of the Elders, 'who provide the cultural continuity in the court'.[83] Blagg referred to discussions with the President of the CCWA which 'suggested an interest in involving local Elders in the court process' and in 'convening Elders' groups to provide advice in terms of identifying credible community resources to support court decisions'.[84]

In our research, there was a widely held view about the need for capacity-building within and between communities for an Indigenous sentencing court to work. Judicial officers and other stakeholders were acutely aware of the shortage of Aboriginal adults able to assume responsibility as 'responsible adults' for youth offenders in the community, and of the absence of pre- and post-sentencing service options, and they voiced concern that the utilisation of Aboriginal courts would do nothing to address this situation. Comparing the WA situation with Victoria, where Indigenous Courts were seen as successful, one stakeholder observed:

> The one I've seen in Melbourne particularly, I think it would be a brilliant thing to do here and I think that's what we should be heading towards; however, I think it would be unrealistic to assume that you could just set one up... I think that that is what we should be aiming for but, really, it has been achieved in Victoria because they have a high rate of diversion from the system and that means they can focus a lot of energy and a lot of resources on fewer cases because they're labour intensive, they take a lot of support, work from the Agencies, they take a lot of time and you can't do it unless, going back to the earlier point that we need a better police diversion.

Focusing more specifically on post-sentencing options, a number of judicial officers in fact expressed the concern that Indigenous courts might be no more than 'window dressing', because Aboriginal Elders might sit at the bench with the magistrate but not have any formal decision-making powers and there would still be no scope to refer Aboriginal children to culturally sensitive services designed and run by Aboriginal people. This view is summarised by one judicial officer, who noted that 'a lot of the problems with Indigenous courts is that the court can't actually impose orders that include programs that are designed and delivered by Aboriginal people who are culturally sensitive to Aboriginal children and re-build Aboriginal children'.

82 Blagg, above n 4, 28.
83 Ibid 29.
84 Ibid.

A further issue highlighted by a number of participants refers back to the cultural diversity of the WA Aboriginal population and, in particular, the urban/rural variation. Several participants noted that the Aboriginal adults chosen to join magistrates in any Indigenous sentencing court model might not have cultural authority over the young people presenting at court, and might not even share their language. They therefore cautioned against potentially discriminatory, reductionist assumptions that Aboriginality *per se* would facilitate effective participation and positive outcomes for Aboriginal young people. Instead, a number of judicial officers and other stakeholders highlighted the need to empower local Aboriginal communities and not use a 'one size fits all' approach. It was suggested that an initial priority might be more effective engagement by Aboriginal communities in the design and implementation of service responses for children and families across both criminal and welfare jurisdictions.

7 Issues Specific to WA

Relative to population size, WA processes a higher proportion of children through the Court than any other state or territory. As set out above, judicial officers were asked a number of additional questions of specific relevance to WA. One of the key themes that emerged was that the sheer geographical size of WA relative to other states and territories presents unique challenges in terms of addressing the needs of Aboriginal children, their families and their communities. In this context, it is significant that the WA Premier recently announced that 'his government may close up to 150 of the state's 274 remote Indigenous communities',[85] noting that there are 115 communities with an average of five residents each.[86] According to WA Government estimates, continuing to fund the existing communities would cost $2-$6 billion over 10 years.[87] The Aboriginal Affairs Minister has suggested the decision about which communities to close will be taken on a case-by-case basis, taking into account the communities' sustainability, but the proposal has been condemned by the Opposition and the Greens.[88] If the proposal does proceed, we would call for consultation with integrity, in order to ensure a gradual approach towards individualised and negotiated decisions.

The over-representation of Aboriginal children and the resource deficiencies that prevent their needs from being properly addressed was a major preoccupation for participants. Speaking again of the impoverished and deprived circumstances

85 Dan Harrison, 'Remote Indigenous Communities Under Threat', *Sydney Morning Herald*, 14 November 2014 http://www.smh.com.au/federal-politics/political-news/remote-indigenous-communities-under-threat-20141114-11myb9.html.

86 'Kimberley Aboriginal Communities Condemn Colin Barnett's Plan To Close Small Communities', *ABC Bush Telegraph*, 20 November 2014 http://www.abc.net.au/radionational/programs/bushtelegraph/aboriginal-community-concern-over-barnett-town-closure-plan/5905056.

87 Jacob Kagi, 'Some of the Smallest Aboriginal Communities Will Survive: WA Government', *ABC Indigenous*, 20 November 2014 http://www.abc.net.au/news/2014-11-20/not-all-remote-aboriginal-communities-will-close-wa-government/5906846/?site=indigenous&topic=latest.

88 Ibid.

of Aboriginal children, families and communities coming before the CCWA, one judicial officer reflected that 'the real question is why do these people come before the courts and why do they offend, which is not really a legal question, it's a sociological question'. Commenting on the legacy of racist colonial policies, the impact of which is still profoundly apparent, particularly in regional and remote WA, a second judicial officer commented:

> In the court, apart from the odd glaring example that makes you concerned, generally there are more Indigenous kids in custody because they are committing more serious offences – that's not racism as such; the problem there is the severe disadvantage and effects of 200 years of colonisation, repression and dispossession.

Reflecting on the over-representation of Aboriginal children in the care and protection system, judicial officers similarly commented on the general material, social and spiritual poverty experienced in many Aboriginal communities, of which poor mental health, abuse of alcohol and other drugs and family violence and child neglect are symptomatic. As one magistrate remarked, '[r]egrettably there are so many communities or parts of communities and families that include serious alcohol, substance abuse, domestic violence and it is simply a case where the young people's well-being are at risk. It is a sad reality'.

There was recognition among participants that the issue of resource impoverishment is compounded in country regions of WA. Blagg has suggested that:

> Aboriginal children and young people in parts of the state, such as the Pilbara, Eastern Goldfields and the East Kimberley are subject to a form of 'Justice by Geography'. Their location determines the quality and consistency of the services they receive. There have been a number of issues raised in the Kimberley area demonstrating that Aboriginal young people in the region receive an inferior service in comparison with the metro area.[89]

The WA analysis found that, in the youth justice jurisdiction, the lack of resources in these areas means that a disproportionate number of young Aboriginal children are denied bail. In the care and protection jurisdiction, the lack of resources in country regions is a factor contributing to the apparently lower standards of care deemed acceptable for Aboriginal children. Clearly, the issues of Aboriginal over-representation and the lack of resources are interlinked and, as such, the system needs to be reworked to overcome the issue of resource impoverishment in country regions in order to improve service outcomes for Aboriginal people in WA.

There was also a common recognition that addressing these deeply embedded social problems in WA is beyond the Court's scope, and a sharp awareness of the need for innovative strategies to engage Aboriginal communities more fully in the reform process, through identifying, mandating, educating and resourcing

89 Blagg, above n 4, 24.

Aboriginal leaders to spearhead this reform process. This was poignantly expressed by one judicial officer as follows:

> The Court doesn't have at its disposal the programs that it wants for Aboriginal children. There aren't programs that Aboriginal people have had at least some part in designing and also some part in delivering. It is only Aboriginal people who can assist young people to understand their own Aboriginal culture and have their own sense of identity. Programs like 'walking the trails', 'learning for the south-west' young Noongar kids learning the Noongar language, the Noongar custom/dance and all those sorts of things – they don't exist; that's what the Court is calling for. The other thing about young Aboriginal children is that you can't really reasonably ask them to change too much if they are the subject of a program that has been designed and delivered by non-Aboriginal people and they are within that program in isolation. Because of the disconnect with Aboriginal children and Aboriginal people from community it is very important that these kids actually are brought together so they can support each other and that mutual support across a number of these young people is important. Dealing with them in isolation means that they are being dealt with and they don't have support by other kids of their same kind. There is a need for a significant shift in the way that the business of juvenile justice is delivered.

There was a perception that youth justice programs are necessary but not sufficient to break the negative cycle within which many Aboriginal children are caught. Participants also argued for an increased emphasis on crime prevention measures and diversionary programs addressing the issues of aimlessness and alienation experienced by many Aboriginal young people. A need was also expressed for the development, resourcing and introduction of drug and alcohol, mental health and family violence services, particularly in regional and remote areas. These suggestions are consistent with the recommendation in the *Doing Time* report that Commonwealth funding be allocated to establish

> a new pool of adequate and long term funding for young Indigenous offender programs…[including]
>
> - drug, alcohol and other substance abuse rehabilitation;
> - continued education and training or employment; and
> - life and work readiness skills, including literacy and numeracy.[90]

All the participants in our study were aware of the resource implications of such innovations, but many commented on the long-term costs, financial and human,

90 *Doing Time*, above n 12, Recommendation 31. Recommendation 39 called on governments to 'coordinate sustained and flexible funding support for a range of youth justice diversion and rehabilitation services which are developed with and supported by local Indigenous communities'. See also Recommendation 10 in relation to mental health issues.

of failing to address these issues.[91] This view was articulated by a judicial officer who reflected on the growing problem of FAS, discussed above and asserted:

> Until we can break that cycle of alcohol abuse amongst the adults you are not going to have an opportunity for kids to have a better life...If the parents are alcohol abusers the children are going to suffer from foetal alcohol syndrome and you are going to continue to have the same problems with no recognition of what the outcomes are going to be, no concept of repercussions for conduct, everything is impulsive, everything is on the spur of the moment. Until you can break that cycle it is just going to continue that same problem.[92]

IV CONCLUSION

This article has sought to contribute to our understanding of Indigenous young people in the justice system by presenting the findings of recent research with magistrates and other stakeholders in the CCWA. The specific areas examined included judicial officers' perspectives on contemporary Aboriginal issues in the Children's Court; training for judicial officers and other stakeholders; court facilities; clients and cases before the Court; clients' understanding of the court process; Indigenous sentencing courts; and issues specific to WA.

Our research found that the needs of Aboriginal children and their families are not being properly addressed due to resource deficiencies across WA, and this is particularly a concern in rural and remote areas. It was acknowledged that Aboriginal communities were affected by the limitations of time, court facilities and legal representation, pre- or post-court services and the lack of suitably qualified professional interpreters. There was a clear awareness that the CCWA is responding, in a very limited way, to behavioural symptoms of long-standing issues of disenfranchisement, impoverishment and despair amongst Aboriginal people. In this context, it is important to note that Weatherburn recently identified the following key risk factors for Indigenous offending:

- poor parenting, especially child neglect and abuse;
- poor school performance and/or leaving school early;
- unemployment; and
- drug and alcohol abuse.[93]

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91 See also *Doing Time*, ibid, 322, where it was recognised that '[t]he cost of wide-scale action in this area is certainly significant. However, our current path ensures the ongoing economic cost of incarcerating another generation and the social cost of losing future generations of Indigenous children to lives in incarceration'.

92 For discussion of alcohol and substance abuse, see *Doing Time*, ibid, 88-95 and note Recommendation 8 that funding for locally based alcohol, anti-smoking and substance abuse programs be increased.

93 Weatherburn, above n 12, 74.

The participants in our study recognised that solving these deeply embedded social problems was beyond the scope of the CCWA, and acknowledged the urgent need to address, in an inclusive and empowering way, the systemic issues underpinning the significant over-representation of Aboriginal children across both criminal and welfare jurisdictions.[94] Judicial officers were aware of the successful introduction of Indigenous courts in other jurisdictions, but were cautious about their utility in WA. Although youth justice programs were seen as necessary, they were considered insufficient to break the negative cycle within which many Aboriginal children are caught. Participants called for an increased emphasis on crime prevention measures and diversionary programs to address Aboriginal young people's alienation. Specifically, they reaffirmed the need for services to address drug and alcohol (especially FAS); mental health; and family violence issues, with a particular need in regional and remote areas.

These suggestions are consistent with the WA State Justice Plan, which was developed by the State Aboriginal Justice Congress and set the following key priorities:

- reform the criminal justice system to achieve fair treatment for Aboriginal people;
- tackle alcohol, drug abuse and mental health issues contributing to crime; and
- strengthen families and communities to build identity and help prevent violence and other crime.[95]

The *Doing Time* report made 40 recommendations to Government and asserted that, in order to effect change in the area of Indigenous disadvantage and disproportionate incarceration rates, the following principles must be applied:

- engage and empower Indigenous communities in the development and implementation of policy and programs;
- address the needs of Indigenous families and communities as a whole;
- integrate and coordinate initiatives by government agencies, non-government agencies and local individuals and groups;
- focus on early intervention and the wellbeing of Indigenous children, rather than punitive responses; and
- engage Indigenous leaders and Elders in positions of responsibility and respect.[96]

In this vein, we suggest that interventions for Aboriginal young people in the

94 See also Blagg, above n 4, 31.

95 Government of Western Australia, *State Justice Plan 2009-2014* (2009), cited in *Doing Time*, above n 12, 34. The Plan was described as 'unique: it is generated and owned by Aboriginal people and supported by the Western Australian Government': 295.

96 *Doing Time*, ibid, 322.

WA justice system be strategically multi-level, multi-method and integrated. According to Allard,[97] 'there is almost no evidence demonstrating the impact of… programs on Indigenous offending [in Australia]'. However, the AIHW[98] recently found that:

- there is some evidence that diversion programs reduce reoffending, but the evidence is not strong;
- 12-18 month diversion programs have better outcomes than very short or extended programs;
- on-the-job work experience and other forms of support, such as mentoring, help reduce reoffending and promote reintegration into the community;
- culturally appropriate treatment initiatives and rehabilitation boost the participation in and completion of a diversionary program; and
- programs that involve Indigenous Elders or facilitators in delivery work better.

In addition, broad-based education of all citizens and professionals working with Aboriginal children, families and communities is required to help develop this multilevel systematic approach. What is also required is a significant paradigm shift from past and current practices, particularly the need to involve Aboriginal people in the planning and delivery of culturally appropriate services in both the child protection and youth justice jurisdictions. Chief Justice Martin has observed that

> the white imposed solutions that we have used in past decades have spectacularly failed to address this problem. I think that a much better way to go is to encourage and facilitate Aboriginal people taking responsibility for and ownership of the solutions that are needed to address these problems. That way, I think we will also encourage them to take some ownership of the problems and to address offending within their communities.[99]

It is critical that there be active and visible Aboriginal participation in the development and implementation of programs, as well as the staffing of community-based services, with the goal that this will ultimately lead to self-determination and self-management by Aboriginal families and communities.

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97 Troy Allard, 'Indigenous Young People and the Justice System – Establishing An Evidence Base' in Anna Stewart, Troy Allard and Susan Dennison (eds), *Evidence Based Policy and Practice in Youth Justice* (Federation Press, 2011) 28, 40.

98 AIHW, 'Diverting Indigenous Offenders From the Criminal Justice System' (Cat No IHW 109, AIHW, 2013) 1.

99 Chief Justice Wayne Martin, cited in *Doing Time*, above n 12, 303.